No. 82-6035

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

MANUEL C. QUINTANA,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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January 13, 1983

QUESTIONS PRESENTED

I. Whether the Virginia capital murder statute that provides that the wilful, deliberate and premeditated killing of a person in the commission of robbery while armed with a deadly weapon is capital murder was unconstitutionally applied to petitioner who was not armed and the killing was accomplished by the use of a hammer belonging to the victim.

II. Whether Petitioner was denied due process of law and was subjected to cruel and unusual punishment because his sentence of death rests, in part, upon a jury finding of "dangerous predicate" based solely on statement of a convicted felon concerning petitioner's crimes committed in Cuba, absent any evidence of conviction for a crime in the United States.

III. Whether a state court's application of a procedural rule that inhibits meaningful review of a death sentence violates its own sentencing statute and petitioner's due process rights.

IV. Whether prospective jurors were improperly excluded in violation of Witherspoon requirements and whether the fundamental right of petitioner to an impartial jury is waivable by petitioner's failure to object at his trial.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

The petitioner, Manuel C. Quintana, respectfully prays for a Writ of Certiorari to the Supreme Court of Virginia to reverse its decision affirming the judgment of the Circuit Court of Arlington County, Virginia, and denying petitioner's request for rehearing.

OPINION BELOW

The judgment and commitment order of the trial court affirming the jury verdict of guilty and the sentence of death is unreported, but is set out in the appendix (See, Appendix A). The opinion of the Supreme Court of Virginia affirming the judgment of the Arlington County Circuit Court is reported at 295 S.E. 2d 643, 243 Va. _____ (1982) and is appended hereto (Appendix B). The Opinion of the Supreme Court of Virginia denying Mr. Quintana's petition for rehearing is unreported, but is set forth in the Appendix (Appendix C).

JURISDICTION

The final judgment of conviction in the Circuit Court of Arlington County, Virginia, was entered on the 4th day of August, 1981 in Commonwealth v. Manuel Quintana, Criminal No. C-17450 (Appendix A). The Judgment of the Supreme Court of Virginia affirming petitioner's conviction was entered on September 9, 1982 in Quintana v. Commonwealth, No. 811845 (Appendix B). The petition for rehearing was denied by the Supreme Court of Virginia on the 15th day of October, 1982 (Appendix C). On December 1, 1982, an extension of time within which to file the instant Petition for Writ of Certiorari was granted upon application to Chief Justice Warren E. Burger, Circuit Justice for the Fourth Circuit (Appendix D).

Said extension was granted to andincluding January 13, 1983. This petition is timely filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting in this Court deprivation of rights, privileges, and immunities secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the law.

2) The Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted.

3) Section 18.2-31(d) of the 1950 Code of Virginia, as amended, attached hereto as Appendix E , defining capital murder and fixing the punishment therefor as death.

4) Section 17-110.1 of the 1950 Code of Virginia, as amended, attached hereto as Appendix E , prescribing the scope and manner of review of death sentences in Virginia.

5) Sections 19.2-264.2 to 19.2-204.5 of the 1950 Code of Virginia, as amended, attached hereto as Appendix E-1, defining the terms and conditions of trial of capital cases.

STATEMENT OF FACTS

On March 19, 1981, the body of Ofelia Quintero, a seventy-two year old Cuban refugee, was discovered by neighbors in a pool of blood on the kitchen floor of her apartment at 748 South Florida Street, in Arlington, Virginia, at around 3:20 in the afternoon. She lived with her forty-six year old unmarried son, Nelson Echemendia.

In the afternoon of March 18, 1981, the day before the homicide, Mr. Quintana was released from the Fairfax County Detention Center following the dismissal of the charges against him earlier that day.

The following morning, March 19, 1981, at around 1:00 p.m. Mr. Quintana showed up in Fairfax County Courthouse and talked to a Carmen Salgado, a traffic court clerk who speaks Spanish.

Just before 2:00 p.m., he arrived at the office of Dennis Reed, a used car dealer in Arlington County, Virginia. Dennis Reed sold a 1969 Plymouth Fury to Mr. Quintana for $350.00. According to Reed, Quintana left his office at around 3:00 or 3:15 p.m.

Quintana then returned to his apartment in Falls Church, Virginia, in the evening of March 20, 1981. The apartment was then occupied by another Cuban refugee, Suarez. Suarez later told Quintana that the police were looking for him on suspicion of the murder of Ofelia Quintero. Suarez admitted that Quintana was surprised by this statement. According to Suarez, Quintana said that "he was not leaving this day and that he had no reason to leave." Quintana also asked Suarez to take him to the police. Suarez later professed his confusion, "I did not believe that a person I knew -- I would assume that anyone who had committed a crime would wish to flee."

The following morning, March 21, Quintana woke up at the same time the Suarez children did. Suarez stated that Quintana was

going to "present an application to Seven Eleven [store] in order to begin working there." He helped Quintana fill out the application form in English. Quintana volunteered to take one of the Suarez children to work. The two left the apartment in Quintana's car at about 6:30 or 7:00 a.m. Quintana, according to Suarez, returned about a half an hour or so later and went back to sleep. When Suarez left to do some shopping for groceries at about 9:00 a.m., Quintana was asleep. This was just two hours before his arrest!

On Saturday, March 21, Arlington police officers went to the Falls Church Drive apartment to locate Quintana. When the police officers entered the apartment they encountered the Suarez children and Quintana. Detective Carrig testified that at a certain point Quintana removed a key ring voluntarily and threw the keys on the table beside Detective Carrig. (T-6/3/81, p. 419) The key ring contained a number of keys and a car dealer's tag. Detective Carrig testified that Mr. Quintana was not trying to hide the keys. (T-6/3/81, p. 419) When Detective Carrig noticed the dealer's tag, he went out to the parking lot to look for the car described on the tag. He later found the car described on the tag at the parking lot. The car was impounded and later searched by the Arlington police. Some of the stolen articles were recovered in that car.

The record below reveals that the victim and her son, Nelson, arrived from Cuba on May 21, 1980. They met Manuel Quintana in a refugee camp in Pennsylvania some time in August of 1980. Nelson and his mother had spent a lot of time with Quintana in the camp; Nelson and Quintana played dominoes in the camp. Nelson and his mother eventually left the refugee camp and settled in Arlington County on September 3, 1980.

Shortly after Nelson and his mother moved to Arlington County, a reunion for Cuban refugees was sponsored by the Catholic Church in Arlington a few days before Thanksgiving of 1980. It was on this occasion that they met Quintana again. According to Nelson, his

mother was very happy to see Quintana. She invited him over to their place so he "can help me with my feet," she said. Quintana had told her he was a chiropractor in Cuba.

After that initial meeting, Quintana visited Ofelia Quintero and her son frequently at her apartment in Arlington County. Quintana occasionally took Nelson and his mother for a ride in his automobile. On one occasion, they visited another lady friend by the name of Ofelina Moya. Mrs. Moya later testified on behalf of Quintana at the penalty stage.

On the 19th of March, Nelson said he left his wallet in a dresser drawer in the bedroom. Nelson admitted there were other people who knew he had a lot of money in the apartment: "Some people know I had the money. They didn't know how much, but two or three people had already asked me if I - to put it in the bank . . ."

According to Nelson he last saw his mother alive when he left for work at 6:30 a.m. on March 19, 1981. He also claimed that he had $1,000.00 in his wallet that morning. Although he testified that he always kept his wallet in the drawer, the police found his empty wallet between the mattress of the bed.

Another Cuban refugee, Orlando Dominguez (hereinafter referred to as Orlando), and his roommate lived in an apartment directly above the victim's apartment. Nelson testified that Orlando and his roommate visited his house: "many times they came for lunch." Apparently the relationship soured when Orlando and his roommate failed to pay the bill for long distance telephone calls to Cuba from Nelson's telephone. The bill was about $298.00. After Nelson had confronted Orlando about the matter, Orlando sent Nelson a threatening note asking Nelson and his mother to leave him alone. The note was dated just ten days prior to the date of the homicide.

During the investigation, Det. Gabrielson testified that at one point he noticed that in one of Orlando's cuticles "was a reddish material which I thought to be blood." When the police officers

attempted to remove a scraping off his finger for laboratory analysis, Orlando resisted sc violently that the four or five officers present were not able to remove the scraping.

Although Det. Gabrielson stated that Orland had a good alibi on the 19th of March, he admitted that at that time he did not know the exact time the woman was killed. It was later discovered that his alibi was flawed. Officer Tamer later found out that he was separated from Jaramillo for about twenty minutes. A witness testified that Orlando was seen walking alone on Greenbrier Street, a block away from the victim's apartment, between 2:00 and 2:30 p.m. on March 19. Jaramillo's apartment is only five minutes at normal walking pace away from the victim's apartment.

There was also testimony that blood samples (Exhibit #8) were lifted from Orlando's apartment door, and also in the hallway or stairwell leading to his apartment from the victim's apartment. Officer Nell also testified about a blood-stained pillow case found in Orlando's bathroom.(T-6/3/81, p. 403)

The autopsy revealed that the victim sustained multiple blows primarily to the head. Internal examination revealed extensive skull fracturer in both the left and rights sides of her head.

The medical examiner also testified that there was no sign of sexual abuse of the victim in that the autopsy revealed no injury to the breast or genital area. Nor was there any evidence of sperm present in these areas.

Dr. Sheehey, the Arlington County Medical Examiner, arrived at the scene at 6:15 p.m. and examined the victim. Dr. Sheehey testified that he was briefed by some of the several police officers on the scene. "I was told that around 1:00 someone had been by and seen that the apartment door was closed and that the impression that I had is that whatever happened had happened between that period, between 1:00 p.m. and 2:30 p.m." In his medical report (Exhibit #12-A), he wrote that "she was last known to be alive about 1:00 p.m." and

placed the time of death at 2:00 p.m. (Exhibit #12-A).

On May 29, 1981, after Quintana was arraigned, a conference was held in Judge Russell's office between the Judge, the Commonwealth's attorneys, and defense counsels. The purpose of the conference was to appoint a psychiatrist to examine Mr. Quintana. Mr. Quintana was not present at this conference.

After denying defense counsel's motion for continuance made the week before, the trial began on June 1, 1981, with the empanelling of the jury. Defense counsel's motion to voir dire in smaller groups was denied. The Court excused for cause a total of thirteen jurors who expressed their opposition to the death penalty during voir dire.

Prior to the Commonwealth's calling of Suarez on the stand, a police officer at the request of the Commonwealth Attorney took an Exhibit in evidence (the three-piece suit) out of the courtroom and showed it to Suarez in an adjacent room without the knowledge of the Judge or the presence of defense counsel. Upon learning of this fact, defense counsel asked for mistrial on the case, but the court denied it. The witness later identified the suit in court as the one worn by Quintana on the day of the murder.

After Mr. Quintana rested his case on June 8, 1981, the Commonwealth presented two rebuttal witnesses. One was Carmen Salgado, whose testimony was offered ostensibly to rebut the evidence of the time of death. Over the objection of defense counsel, the court allowed the jury to hear her testimony. She testified that Quintana came to see her looking for an attorney, after seeing an old woman with gashes on her head; that his shirt had blood stains on it. She also testified that Quintana was wearing casual clothes, not a three-piece suit. Defense counsel attempted to introduce surrebuttal evidence to explain Salgado's testimony, but the court refused it.

Towards the end of the Commonwealth's rebuttal arguments,

Quintana rose up to address the court and protest the accusations of the Commonwealth Attorney, who pointed a finger at him while delivering his arguments. (T-6/9/81, p. 1384) When Quintana continued to speak after being warned by the Judge to stop, he was removed from the courtroom by Sheriff deputies. Although this was not the first time Quintana attempted to address the court, defense counsel objected to Quintana's removal from the courtroom.

The jury began deliberations at 4:10 on June 9, 1981. At 8:50 p.m., the jury asked the court whether it was possible to consider a separate murder and robbery charge. (T-6/9/81, pp. 1341-42) After the Judge answered in the negative, the jury returned to deliberate at 9:07 p.m. Thirty-three minutes later, the jury returned a verdict of guilty against Mr. Quintana.

When the jury returned the following day for the penalty proceedings, the Commonwealth presented the testimony of Pedro Castro, who was with Mr. Quintana in Arlington Jail. He testified that Quintana told him he had murdered a man in Cuba. Defense counsel sought to bar this testimony as hearsay, but the trial Judge allowed the testimony as a declaration against penal interest.

In an attempt to mitigate the penalty, Mr. Quintana called Ofelia Moya to the witness stand. Moya, an elderly Cuban refugee, testified that Quintana had been a big help to her around the house; that he took her places in his car; that he was always well-behaved, and good to her daughters. (T-6/10/81, p. 1448)

During the deliberations on the penalty stage, the jury asked the court whether at this stage of the trial they could consider the defendant as <u>absolutely</u> guilty for purposes of the penalty; they also informed the court that they are split six to six "and are grasping for guidance." Defense counsel again demanded a mistrial since the jurors apparently were confused as to the proper standard for a finding of guilt. The court rejected the motion for mistrial. Shortly thereafter, the jury returned a verdict recommend-

ing the death penalty.

The case was referred to the Probation Office for investigation and preparation of a presentence report, and the case was continued to August 3, 1981, for sentencing and post verdict motions.

On August 3, 1981, the trial court received the presentence investigation and report and heard arguments of counsel. Following Mr. Quintana's allocution, the trial judge sentenced Mr. Quintana to "suffer death in the manner provided by law." The court then informed Mr. Quintana of the automatic review of sentence by the Supreme Court of Virginia and, being unable to afford counsel of his own choosing, counsel were appointed by the court for the appeal.

REASONS FOR GRANTING OF THE WRIT

I

The Virginia Capital Murder Statute providing that the wilful, deliberate, and premeditated killing of any person in the commission of robbery while armed with a deadly weapon, is capital murder was unconstitutionally applied to petitioner who was not armed and where the killing was accomplished with the use of a hammer belonging to the victim.

Petitioner was convicted and sentenced to death under a Virginia statute which, in part, provides:

> "The following offenses constitute capital murder, punishable as Class 1 felony:
>
> * * *
>
> (d) the wilful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;"
> (Sec. 18.2-31(d), Va. Code)

The language of the statute became of critical importance when the evidence of the Commonwealth showed that the petitioner was not armed when he entered the victim's apartment, that victim and petitioner were friends, that they were drinking coffee prior to the murder, and there was no direct evidence of petitioner's prior intent to rob the victim.

Petitioner has argued before the Virginia Supreme Court that "[T]he concept of robbery 'while armed with a deadly weapon' is essentially foreign to Virginia law. Unlike other states with varying degrees of robbery, Virginia has no 'armed robbery' statute." Petitioner concluded that because this Court (Virginia Supreme Court) has not defined the scope of "while armed" - as opposed to "with the use of" - a deadly weapon, and because Virginia has no concept of armed robbery per se, it would be unconstitutional to apply the statute to the case of petitioner where, as here, the evidence was clear that he did not arm himself with a weapon when he came into

the victim's apartment.

Based on the language of the capital murder statute, it seemed to petitioner that the Virginia General Assembly has decided that a killing committed by a person with the use of a hammer seized at the scene of the crime is less reprehensible than a murder committed by a robber who armed himself with an instrument of death in preparation for the robbery. In its Opinion, the Virginia Supreme Court replied: "We do not believe the General Assembly intended to make such obstruse distinctions in degrees of criminal culpability when it selected the offense reserved for the ultimate penalty." (Appendix , Slip Opinion, p. 7-8) On the contrary, this Court has long recognized that "it is a precept of justice that punishment for crimes should be graduated and proportioned to the offense." Weems v. United States, 217 U.S. 349, (1910) at 367.

It is reasonable to assume that there is higher degree of culpability when a person, in preparation for a crime, arms himself with a firearm or a knife. Certainly, one who pre-arms himself has made up his mind to hurt and injure anybody who stands in his way to accomplishing his criminal purpose; whereas one who is without a weapon has the option of running away when met with resistance. A statute prescribing the ultimate penalty of death cannot reasonably include such a wide range of criminal culpability within its coverage without violating this Court's mandate in Furman v. Georgia, 408 U.S. 238 (1972).

The requirement that crimes be described with appropriate definiteness, which has been referred to as fundamental common-law concept, is generally held to be an essential element of constitutional due process of law. In Lanzetta v. New Jersey, 306 U.S. 451 (1939), this Court said:

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids. The applicable rule is stated in Conally v. General Construction Co., 269 U.S. 385, at 391: "that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (at p. 453; cited with approval in Baggett v. Bullitt, 377 U.S. 360 (1964).

In analyzing the Virginia statute, petitioner submits that the only permissible application of the law is to one who arms himself in preparation for a crime. The dictionary meaning of being armed is to furnish or equip one's self with weapons for offensive or defensive purpose. (See Black's Law Dictionary, Fifth Edition, p. 99) Since petitioner was not armed when he went into the victim's apartment, his conduct is not covered by the proscription of Sec. 18.2-31(d). For if the Virginia legislature intended a broader application, it would have used a more direct language, such as: with the use of a deadly weapon instead of being armed.

However, to the extent that reasonable men will differ as to the meaning of the statute as worded, petitioner submits that said statute is impermissibly vague and ambiguous.

The wording of the Virginia capital murder statute suffers from other ambiguity: Does the phrase "while armed with a deadly weapon"refer to the killing or to robbery? If it refers to the robbery, does the Virginia legislature limit capital murder to the killing in the commission of armed robbery? If so, then the killing in the commission of "strong arm robbery" would not be covered by the statute.

Crimes are not to be created by inference and may not be

constructed nunc pro tunc; a penal statute must set up ascertainable standards. To satisfy constitutional due process, it is required that the language of penal statutes, when measured by common understanding and practices, give adequate warning of the conduct proscribed. Necessarily, this requirement is heightened when the ultimate penalty is prescribed for its violation.

Petitioner submits that the Virginia capital murder statute does not give adequate warning to all persons as to what particular conduct is proscribed.

II

Petitioner was denied due process of law and was subjected to cruel and unusual punishment because his sentence of death rests, in part, upon a jury finding of the "dangerousness" predicate based solely on the statements of a convicted felon concerning petitioner's crimes in Cuba, and absent any record of conviction for any crime in the United States.

At the sentencing phase of petitioner's bifurcated trial, the Commonwealth introduced testimony of a witness to whom petitioner allegedly made certain statements about his past criminal conduct while both were waiting for trial in Arlington County Jail. According to the witness (Castro), petitioner stated that "he killed a man" in Cuba by cutting his throat; that petitioner was in jail at the time for "carrying off a girl" and raping her; that he had planned "to carry off a girl again" from a junior high school in Virginia; that "he had a house" in Virginia in which to keep hostages "that he picked up"; and that when petitioner was released from jail he planned to "grab" a specified individual. (See Appendix B , Quintana Slip Opinion, p. 16). That was Commonwealth's entire case to prove the "dangerousness predicate" in order to justify the death penalty.

Petitioner did not testify at his trial or at the sentencing phase. The Commonwealth did not introduce any official

record of conviction from Cuba or any criminal conviction in the United States; no witness testified as to any crime petitioner may have committed in the United States. In short, there was no corroboration of petitioner's alleged statements to Castro, the witness.[1]

At the trial, petitioner objected to the testimony of Castro on the ground that said statements constitute inadmissible hearsay evidence. The trial court, however, admitted the statements as an admission by a party in interest. Petitioner argued unsuccessfully his objection before the Virginia Supreme Court.

Although the issue is ostensibly a matter of Virginia evidentiary law, there comes a point at which the evidence being introduced in support of a death penalty case implicates Eighth Amendment and Fourteenth Amendment values as well. In addition to the problem of the right of confrontation and therefore of the hearsay nature of these statements (presumably a Sixth Amendment violation), the Commonwealth used petitioner's statements as the only evidence of a prior violent conduct to support the "dangerousness" predicate in order to justify the death penalty.

It is a fundamental premise in our system of criminal justice, that the defendant's own statements cannot be used to establish the corpus delicti of the offense charged. Petitioner submits that the corpus delicti at capital sentencing in a bifurcated trial of a capital murder includes establishing prior violent conduct, where the state predicates its demand for the death penalty upon defendant's future dangerousness.

Under Virginia statute, the "penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior

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[1] The presentence report submitted in court did not contain any record of criminal convictions.

history of the defendant . . . that he would commit criminal acts of violence that would constitute a continuing serious threat to society . . ." (Sec. 19.2-264.4(c), underscoring added). This is the same high standard of proof that the Commonwealth must meet to prove defendant's guilt at his trial. Citing, Addington v. Texas,[2] this Court in Bullington v. Missouri, stated.

> The state's use of this standard indicates that, as has been said generally of the criminal case, "the interest of the defendant are of such magnitude that . . . they have been protected by standard of proof designed to exclude as nearly as possible the likelihood of any erroneous judgment . . . [O]ur society imposes almost the entire risk of error upon itself." 451 U.S. 430, (1981) at 441.

On any matter as to which the Commonwealth has the burden of proof beyond a reasonable doubt, those matters may be taken to be "elements" of the offense under the analysis in Mullaney v. Wilbur, 421 U.S. 684, (1975) and In re Winship, 397 U.S. 358, (1970).

Petitioner submits that any matter that constitutes an element of the offense is properly a matter on which the statements of the defendant, by themselves, should be insufficient to establish the corpus delicti. Therefore, petitioner may not properly be found to be a threat to society because of his criminal background, where details of this criminal background came only from his own statements.

Just as it violates due process to convict an accused based on insufficient evidence under Jackson v. Virginia, 443 U.S. 307, so would it violate this Court's mandate in Jackson and Bullington to impose the death penalty on insufficient evidence.

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[2] 441 U.S. 418, at 423-424 (1979)

III

The Virginia Supreme Court's application of a procedural rule that in effect bars a meaningful review of a death sentence violated its own sentencing statute and petitioner's due process rights.

On appeal before the Virginia Supreme Court, petitioner argued that the jury's penalty verdict was ambiguous "and therefore violated his constitutional right to a unanimous verdict." Two state justices agreed stating that "commutation is a constitutional and statutory imperative" in this case. However, the majority refused to consider this argument on appeal on the ground that petitioner had not preserved the issue at his trial nor raised it by assignment of error on appeal.

Petitioner supports the view of the dissenting justices that "the majority misconceives the nature and scope of appellate review of the death penalty."

The language of Sec. 17-110.1 leaves no room to doubt that it is mandatory: it provides, in part -

> "17-110.1 A. A sentence of death, upon the judgment then becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.
>
> * * *
>
> C. In addition to consideration of any errors in the trial enumerated by appeal, the Court shall consider and determine:
>
> 2) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> F. Sentence review shall be in addition to appeal, if taken, and review and appeal may be consolidated . . ." (emphasis added)

The only logical conclusion from the clear mandatory language of this provision is that the Legislature has removed from the defendant, in capital cases, the burden of raising the issue or issues to be reviewed by the Court as it concerns sentencing. The Court has a duty to review all death sentences, even where a particular defendant not only acquiesce to the verdict but also accepts

the death sentence!

In Gregg v. Georgia (428 U.S. 153, 1976), Justice Stewart observed that correction of arbitrary sentences was rendered more likely by the statute's mandatory appellate review provisions. At p. 198. It is, however, in Woodson v. North Carolina (428 U.S. 280, 1976) that this Court articulated its sentencing requirements for capital cases. After Woodson, consideration of mitigating and aggravating circumstances becomes a "constitutional imperative." In addition, Woodson established the "fundamental respect for humanity" rationale as an independent ground for requiring individualized capital sentencing procedures. (Woodson, at p. 304)

The record shows that in the case of Mr. Quintana the jury returned a verdict in the alternative form. Although the Commonwealth attempted to prove both the "vileness predicate" and "the dangerousness predicate," the jury only found one, but did not indicate which one.

The minority opinion was correct in stating that a verdict stated in the alternative prevents the Court from conducting a meaningful disproportionality analysis mandated by Sec. 17-110.1, since the Court cannot determine upon what finding or findings defendant's death penalty was predicated. Thus, the State Supreme Court cannot identify "similar cases" for purpose of comparison.

Sec. 17-110.1 provides for a mandatory review procedure that asks the Court to "consider and determine: . . . whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, . . ." As the minority opinion in the Quintana case pointed out, "For proper disproportionality analysis, 'similar cases' are those in which penalties were based upon the same predicate (or predicates) as that underlying the penalty under review." (Appendix B-1, p. 3, dissenting opinion, citation omitted) The dissent pointed out that because this Court cannot determine upon what finding or findings defendant's death penalty was predicated,

this Court "cannot identify similar cases for purpose of comparison. Hence we are unable to determine whether his penalty is excessive or disproportionate." (Appendix B-1, p. 4, dissenting opinion) Since effective sentence review is prevented by the form of the verdict returned by the jury, the majority opinion's procedural ruling (note 6, p. 17, Majority Opinion) when applied to the "disproportionality inquiry" violates the statutory command of Code Sec. 17-110.1.

The imposition of the death sentence, based on an ambiguous verdict that prevented a meaningful disproportionality analysis also violates Mr. Quintana's due process rights. In his dissent in McGautha v. California (402 U.S. at 248-312, Brennan, J. dissenting), Justice Brennan stated that due process first requires that individuals be protected from the arbitrary exercise of state strength, in that state policies underlying the exercise of power are made by "some responsible organ of government." At p. 270. The second due process concern is that meaningful appellate review not be frustrated by obfuscatious procedure. At p. 267 (citing Louisiana v. U.S., 380 U.S. 145, 1965).

The Virginia Supreme Court correctly stated the rule in a recent case, Fitzgerald v. Commonwealth, Va. 292 S.E. 2d, 798 that the waiver rule does not apply to the penalty review mandated by Code Sec. 17-110.1(c). The Virginia Court then said:

> "Although he assigned it as an error, Fitzgerald did not argue in brief or before us that the sentence of death imposed upon him was excessive or disproportionate. Nevertheless, under mandate of Code Sec. 17-110 (c) it is our duty to consider and determine this question . . . " (p. 27 slip opinion, underscoring added)

In applying the procedural bar of Virginia Supreme Court Rule 5:21 in the case of Mr. Quintana, the Court claims "there was not only acquiescence but also affirmative ratification of the verdict form by the defendant, both before the form was tendered

to the jury and after the verdict was returned." (Appendix B, note 6, p. 17) However, if Sec. 17-110.1 is truly mandatory - as it should be in order to pass constitutional muster - then the degree of acquiescence or extent of waiver by defendant is irrelevant.

It is not enough, however, that the standards and procedures set forth under Virginia capital sentencing statute be found to conform to the commands of Furman v. Georgia (408 U.S. 238, 1972) that the death penalty not be imposed capriciously or in a freakish manner. Appellate review of death sentences itself must not be done capriciously or in a freakish manner. In Zant v. Stephens, (50 U.S.L.W. 4422, 31 Crl 3035, May 4, 1982), this Court explained:

> "We recognized that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court construing the state and reviewing capital sentences consistenly with this concern . . . Our review of the statute did not lead us to examine all of its nuances . . ." (31 Crl 3036)

In Zant, this Court was asked to decide "whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence." (Id. p. 3036) Despite the clarity of the Georgia rule, the Court majority finds "considerable uncertainty" about its premises, which the state court has never explained. It would therefore be "premature," the majority opinion says, to decide whether the reasons for the rule "might undermine the confidence we expressed in Gregg v. Georgia, 428 U.S. 153 (1976), that the Georgia capital sentence system, as we understood it then, would avoid the arbitrary and capricious imposition of the death penalty and would otherwise pass constitutional muster." (31 Crl 3036)

IV

Prospective jurors were improperly and unconstitutionally excluded in violation of Witherspoon requirements despite petitioner's failure to object to their excusal, since right to an impartial jury is a nonwaivable and fundamental right of an accused.

The standard developed by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968) rhrg. denied, 393 U.S. 898 (1968), for excluding prospective jurors who oppose the death penalty is a very strict one: Only jurors who are unequivocally opposed to the imposition of the death penalty may be excluded for cause. Applying this standard in Boulden v. Holman, 394 U.S. 478 (1969), and Maxwell v. Bishop, 398 U.S. 262 (1970), this Court disallowed exclusion of veniremen who had not unequivocably stated that they would refuse to vote for the imposition of the death penalty in any case.

Thus, in two successive terms after Witherspoon, this Court firmly established the Witherspoon rule to be that no veniremen may be constitutionally excluded from a jury unless he is unambiguously and categorically unwilling to consider the imposition of the death penalty in any case, no matter what the facts.

On June 28, 1981, this Court applied the holdings in Boulden and Maxwell to vacate several death sentences where excluded veniremen had stated that they did not believe in the death penalty but had not unequivocally stated that they would refuse to vote for its imposition regardless of the evidence presented at trial. Ladetto v. Massachusetts, 403 U.S. 947 (1971); Turner v. Texas, 403 U.S. 947 (1971); Segura v. Patterson, 403 U.S. 946 (1971); Pemberton v. Ohio, 403 U.S. 947 (1971); Funicello v. New Jersey, 403 U.S. 948 (1971).

In reviewing the excusal of scrupled prospective jurors for cause under the Witherspoon v. Illinois, supra, it must be remembered that Witherspoon requires that the juror make his

categorical opposition to the death penalty "unmistakably clear." It cannot be said from the record of this case that excused veniremen Lee, Steigleman, McKenna, Hickey, Loucas, Gray, Matticole, Welch, Bishop, Kelley, Lesse made their views "unmistakably clear", for the Judge never specifically instructed them during voir dire that the law requires a juror to "subordinate his personal views to what he . . . (perceives) to be his duty to abide by his oath as a juror and to obey the law of the State" (391 U.S. at 514-515, n. 7). As this Court noted:

> Obviously many jurors "could, notwithstanding their scruples (against capital punishment), return . . . (a) verdict (of death) and . . . make their scruples subservient to their duty as jurors."

None of the thirteen veniremen excused for cause by the trial Judge in the Quintana case were asked whether despite their views on capital punishment, they could abide by the law and the instructions of the Judge. They were therefore prematurely excused, with the showing required by Witherspoon for disqualification incomplete.

This Court in Adams v. Texas, 448 U.S. 38 (1980), squarely reaffirmed the Court's holding in Witherspoon: the states may not exclude prospective jurors for cause in capital cases merely because they have "conscientious scruples against or were otherwise opposed to capital punishment." 65 L.Ed, 2d 581 at 588. Adams also reiterated the test set forth in Witherspoon that "if prospective jurors are barred from jury service because of their views about capital punishment on "any broader basis than inability to follow the law or abide by their oaths, the death sentence cannot be carried out."

The Virginia Supreme Court, however, did not address this issue, preferring instead to infer waiver of this objection under Rule 5:21 of the Rules of the Virginia Supreme Court. While Rule 5:21 has been applied by the Virginia Supreme Court in many cases, notably on the question of admissibility of evidence, the state court

has had no occasion to apply the waiver rule against loss of constitutional rights.

While the question of waiver must depend in each case, upon the particular facts and circumstances surrounding that case, "court must indulge every reasonable presumption against the loss of constitutional rights," Illinois v. Allen, 397 U.S. 337, 343 (1970), rhrng, denied, 398 U.S. 915 (1970).

This Court has implicitly held that error under Witherspoon v. Illinois, supra., is fundamental and cannot be waived. Jury selections in violation of Witherspoon "necessarily undermines . . . 'the very integrity of the . . . process'" leading to the imposition of the death sentence. Id. at 523 n.22. Moreover, this Court has reversed a number of death sentences (see, e.g. Boulden v. Holman, supra; Maxwell v. Bishop, 398 U.S. 262 (1970); Wigglesworth v. Ohio, 403 U.S. 947 (1971); and Harris v. Texas, 403 U.S. 947 (1971) despite lack of a contemporaneous objection to Witherspoon violation.

CONCLUSION

For all the above reasons, and in the interest of justice and due process of law, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Virginia affirming the conviction and sentence of death imposed upon petitioner by the Circuit Court of Arlington County, Virginia.

Respectfully submitted,

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